



LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. 2011-5]

Deposit Requirements for Registration of Automated Databases That Predominantly Consist of Photographs

AGENCY: Copyright Office, Library of Congress

ACTION: Final rule.

SUMMARY: The Copyright Office is amending its regulations governing the deposit requirements for applications for automated databases that consist predominantly of photographs. The amendments require that, in addition to providing material related to claimed compilation authorship, the deposits for such databases include the image of each photograph in which copyright is claimed.

DATES: *Effective Date:* This rule shall take effect [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Robert Kasunic, Deputy General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024-0400. Telephone (202) 707-8380; fax (202) 707-8366. All prior Federal Register notices and public comments in this docket are available at <http://www.copyright.gov/docs/databases/>.

SUPPLEMENTARY INFORMATION:

Background

The Copyright Office has long allowed photographers to register groups or collections of photographs, including groups of either published or unpublished photographs when certain requirements are met. *See* 37 CFR 202.3(b)(4)(i)(A) and (B).

Moreover, in 2001, after an extensive rulemaking proceeding, the Office adopted a group registration procedure for published photographs that complemented the existing procedure for

registering a collection of unpublished works in a single registration. *See* Registration of Claims to Copyright; Group Registration of Photographs, 66 FR 37142 (July 17, 2001)(codified at 37 CFR 202.3(b)(10)). The result was a new group registration procedure permitting registration of a group of published photographs, all taken by the same photographer and published within the same calendar year, upon submission of an application for registration and a deposit consisting of each of the images covered by the registration. At the same time, the Office liberalized its requirements with respect to acceptable formats of deposits of photographs for registrations of unpublished collections, as well as for the new group registration of published photographs option. *See* 37 CFR 202.3(b)(1) and 202.20(c)(2)(xx). The 2001 regulations ensured that together, the registration record and the deposit would provide a sufficient record to identify the individual photographic works contained in the registered copyright claim.

Despite the availability of these options, however, some applicants have registered groups of photographs using the registration option for automated databases. The group database registration option was first announced in 1989. *See* Registration of Claims to Copyright Registration and Deposit of Databases, 54 FR 13177 (March 31, 1989). It has been used to register databases consisting predominantly of photographic images since at least 1997. *See, e.g.,* Registration No. VA 863-785 (Corbis Digital Online Update Group, from March 18-June 30, 1997) (effective date Nov. 6, 1997). A published database may be registered as a compilation, and the group database registration provisions permit a single registration that covers up to three months' worth of updates and revisions to an automated database if all of the updates or other revisions (1) are owned by the same copyright claimant, (2) have the same general title, (3) are similar in their general content, including their subject, and (4) are similar in their organization. 37 CFR 202.3(b)(5). Using this provision, stock photography agencies have registered all the photographs added to their databases within a three-month period when they have obtained copyright assignments from the photographers.

In the interim regulation establishing a pilot program for online applications for group registrations of databases consisting predominantly of photographic authorship, the Office included a requirement that the deposit accompanying such an online submission must include all individual photographs included in the claim. *See* Interim Rule, Registration of claims of copyright, 76 FR 4072-4076 (January 24, 2011); 37 CFR 202.20(c)(vii)(D)(8).

In addition to establishing the pilot program for online submissions, the interim rule announced that the Office would be reviewing the circumstances and conditions under which database registrations may be made and the extent to which, going forward, such registrations should continue to be deemed to cover not only the compilation authorship (*i.e.*, the authorship involved in the selection, coordination and arrangement of the data and/or works assembled in a database) but also any or all of the individual works assembled in the database.¹

In the interest of reconciling the deposit requirements for registrations consisting predominantly of photographs, on January 28, 2011, the Office published a notice of proposed rulemaking to extend the requirement of a deposit of all of the individual images included in a claim to cases in which *paper* applications are used for group registration of databases consisting predominantly of photographic authorship. 76 FR 5106. The amendment would provide that, for any registration of an automated database consisting predominantly of photographs (whether the application is made by paper application or online pursuant to the Interim Regulation), the deposit shall include, in addition to the descriptive statement currently required under § 202.20(c)(2)(vii)(D)(5), all of the photographs included in the copyright claim being registered. 76 FR 5106. Identifying material would not constitute a sufficient deposit. While most applications for group registration of databases consisting predominantly of photographic

¹ Accordingly, and in light of the longstanding availability of the option of registering unpublished collections and the lengthy and carefully considered rulemaking that established the procedures for group registration of published photographs, the Office prefers and urges claimants to use those two options when registering groups of photographs rather than using the provisions for registration of automated databases.

authorship typically provide all of the photographs in the deposit, some submissions that comply with the current requirements for this group registration option do not include all of the photographs.

Public Comments

The Copyright Office received three comments in response to the notice of proposed rulemaking. The comments generally supported the pilot program, the opportunity to register groups of published images by electronic submission, and the requirement of a more complete deposit.

Comments submitted on behalf of the Picture Archive Council of America (PACA) and Public Knowledge both acknowledged that the proposed amendment would create a more complete public record. PACA specifically noted that a deposit of all photographs would “avoid unnecessary disputes over whether a particular photograph is within the scope of the registration.” Public Knowledge stated that the quick and accurate identification of a copyright owner is necessary for both the public and creators. It asserted that without this information, it is difficult to near impossible for the public to make use of the work, or for creators to be compensated for that use. Public Knowledge commented that the consequences of being unable to identify the owner of a work are “vividly illustrated by the status of orphan works.” Orphan works are works that may be protected by copyright, but cannot be licensed by the public because there is no way to identify or locate the actual owner of the works or the owners of particular rights.

Comments submitted on behalf of the Professional Photographers of America, the Society of Sport & Event Photographers, the Student Photographic Society, Evidence Photographers International Council, and the Stock Artists Alliance (hereinafter “PPA comments”) supported the pilot program and electronic registration options for photographic works in general. However, their comments also expressed concern that the proposed regulation would create “double the effort” for professional photographers who may have “...already devised an automated system for cataloguing their creative work.” The comments stated that the

new deposit requirements would not create an additional incentive to register a database of images, and that a photographer would be equally served to follow the existing process for registering groups of either published or unpublished work.

Some comments proposed further clarification and/or procedures to improve the registration process in general, as well as improved online searching tools for copyright records.

Discussion

Based on the reasoning expressed in the Notice of Proposed Rulemaking, and upon consideration of the public comments received, the Copyright Office concludes that when a registration is made for a database consisting predominantly of photographs, and the copyright claim extends to the individual photographs themselves, each of those photographs must be included as part of the deposit accompanying the application. As the Office has previously stated:

[T]he Office rejects the plea of at least one commenter to permit the use of descriptive identifying material in lieu of the actual images. Although the Office had previously expressed a willingness to consider such a proposal, the most recent notice of proposed rulemaking noted that “the Office is reluctant to implement a procedure that would permit the acceptance of deposits that do not meaningfully reveal the work for which copyright protection is claimed.” Deposit of the work being registered is one of the fundamental requirements of copyright registration, and it serves an important purpose. As the legislative history of the Copyright Act of 1976 recognizes, copies of registration deposits may be needed for identification of the copyrighted work in connection with litigation or for other purposes. The ability of litigants to obtain a certified copy of a registered work that was deposited with the Office prior to the existence of the controversy that lead to a lawsuit serves an important evidentiary purpose in establishing the [identity] and content of the plaintiff’s work.

Registration of Claims to Copyright, Group Registration of Photographs, 66 FR 3712, 37147 (July 17, 2001) (citations omitted). Identifying portions and a descriptive statement will no longer constitute a sufficient deposit. The requirement that all photographs covered by a registration are to be included as part of the deposit is in addition to the existing deposit requirements for identifying material (including a descriptive statement in the case of group registration for revised or updated versions of a database) set forth in § 202.20(c)(2)(vii)(D).

While the Copyright Office recognizes that the proposed deposit requirements for automated databases consisting predominately of photographic authorship require the submission of additional material on the part of the photographer, the Office already requires this material for the all other registration options for published and unpublished photographs, as well as for online applications to register photographic databases. Moreover, the prevailing practice with respect to almost all registrations of predominantly photographic databases has been to include all of the photographs in the deposit.² The regulation simply aligns the deposit requirements for paper applications to register automated databases that predominantly consist of photographs with the requirements already imposed for all other registration options for groups of photographs and with the prevailing industry practices. Moreover, it creates a better registration record by making it possible to determine which photographs are actually included in a particular group registration.

Other Issues

The Office notes the concerns expressed by commenters related to other registration and public record issues. Although they are outside the scope of the present rulemaking, the Office will take them into account as it endeavors to continue improving the copyright system for the benefit of creators and users of copyrighted works.

Claimants submitting applications for group registration of photographic and other databases that select and arrange works protected by copyright and who intend to include claims in those component works within the scope of the registration are advised that it is in their interest to specifically identify (1) the author of each of the component works, and (2) for each author, the title of each of his or her component works on the application. A number of district courts have ruled that a certificate of registration that does not identify the author and title of a particular work does not cover that particular work. *See, e.g., Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co.* 2010 WL 3785720, No. 3:09–CV–0061–HRH (D.Alaska,2010); *Bean v.*

² However, a very small number of applications are submitted with deposits consisting of only the bare minimum number of photographs required by the current regulations, resulting in a woefully inadequate deposit.

Houghton Mifflin Harcourt Publishing Co., 2010 WL 3168624, No. CV10–8034–PCT–DGC, (D.Ariz.,2010); *Muench Photography, Inc. v. Houghton Mifflin Harcourt Publishing Company*, 712 F.Supp.2d 84 (S.D.N.Y.2010). The Copyright Office is optimistic that those decisions will be overturned on appeal, but applicants who do not specifically identify each author and title run the risk that their registrations will be considered not to extend to each work in the group. And regardless of the outcome of that litigation, specific identification of each author and title creates a more accurate and informative public record. Applicants seeking guidance as to how to identify each author and title on a paper or electronic application should contact the Visual Arts Division at (202) 707- 8202.

In the next year, the Office is likely to propose additional regulatory amendments relating to various group registration options, including group registrations of automated databases, in part to address some of the issues that have arisen in the recent litigation.

List of Subjects in 37 CFR Part 202

Copyright.

Amended Regulation

In consideration of the foregoing, Part 202 of Title 37 of the Code of Federal Regulations is amended to read as follows:

PART 202-PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

1. The authority citation for part 202 continues to read as follows:

Authority: 17 U.S.C. 408, 702.

2. Amend § 202.20 as follows:

- a. In paragraph (c)(2)(vii)(D)(5) introductory text by removing “electronically submitted” after “or in the case of”;
- b. In paragraph (c)(2)(vii)(D)(8) by removing “submitted electronically” after “case of an application”; and

c. In paragraph (c)(2)(xx) introductory text remove “registered with an application submitted electronically” after “and for automated databases that consist predominantly of photographs”.

Dated: June 4, 2012

Maria A. Pallante,
Register of Copyrights.

Approved by:

James H. Billington,
The Librarian of Congress.

[BILLING CODE: 1410-30-P]

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